Supreme Court of the United States

OCTOBER TERM, 1897

No. 157.

HENRY C. KING, Plaintiff in Error,

vs.

M. P. MULLINS, ALEXANDER McCLINTOCK, AND JOHN McCLINTOCK, Defendants in Error.

HOLMES CONRAD,
Of Counsel for the Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9-20-'98

IN THE

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This case is here on writ of error to the circuit court of the United States for the district of West Virginia.

King, the plaintiff in error, brought ejectment against a large number of defendants, complaining that they unlawfully withheld possession from him of "a certain tract or parcel of land in the States of Virginia, West Virginia, and Kentucky, being a tract of land granted to Robert Morris by the Commonwealth of Virginia by patent dated June 23, A. D. 1795, land in the said patent described as follows," &c.

The three defendants in error here elected to sever in their defense, and the cause was proceeded in as to them to verdict and judgment (Record, page 8), which was for the defendants, and the case is here on writ of error sued out by the plaintiff.

Before considering the several assignments of error relied

on to reverse the judgment below, it is proper to inquire whether the Supreme Court of the United States can review that judgment at all, and whether this writ of error must not be dismissed for want of appellate jurisdiction in this court.

The circuit court of appeals alone had jurisdiction to review by writ of error the judgment of the circuit court.

The plaintiff invoked the jurisdiction of the Federal court by the averment in his declaration of the diverse citizenship of the opposite parties to the cause. He averred no other ground for Federal jurisdiction, original or appellate.

It appears from the Record (pages 29–31) that after the evidence was all before the jury the court, at the instance of the defendants, instructed the jury as follows, viz:

"The jury are instructed that the title to the land claimed by plaintiff, granted to one Robert Morris by the Commonwealth of Virginia by patent dated June 23, 1795, was (prior to the date of the deed made by John V. Le Moine to Henry C. King, under which the plaintiff now claims), under the provisions of the constitution of the State of West Virginia, forfeited to and vested in said State, and was so forfeited at the time this suit was instituted, and that therefore the plaintiff took and has no title to said land, and the jury are further instructed to render a verdict in favor of the defendants."

It is assigned as error in the judgment that the circuit court had given this instruction:

"Because the provisions of said State constitution relating to forfeiture and attempting and purporting to forfeit and divest the title to the land out of the owner and vest the same in the State or in some other person for the failure of the owner of such land to cause the same to be entered upon the land books are wanting in due process of law and are repugnant to and in conflict with article XIV, section 1, of the amendments to the Constitution of the United States, and are in conflict with and repugnant to paramount and controlling provisions of said State constitutions, viz., article III, sections 4, 5, 9, 10, 20, and article —, section 1, and are therefore null and void." (Record, pages 33, 34.)

Here the constitution of the State of West Virginia is claimed to be in contravention of the Constitution of the United States, and, under the "court of appeals act" of March 3, 1891, section 5, writs of error in such cases may be taken from the circuit courts direct to the Supreme Court.

But this ground of Federal jurisdiction was not claimed in the declaration, and appeared for the first time at a subsequent stage of the proceedings, and not in any pleading in the cause, but argumentatively, being urged by the plaintiff as the ground of objection to the instruction given by the court to the jury.

When the jurisdiction of the Federal courts is invoked upon the ground of diverse citizenship alone, it cannot be affected by subsequent developments in the course of proceedings, and as by the act of March 3, 1891, section 6, "the judgments and decrees of the circuit courts of appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit being citizens of different States," and to the courts of appeal is given exclusive jurisdiction to review by writs of error the judgments of the circuit courts in all cases other than those provided for in section 5 of that act, the supreme court has no jurisdiction to review this judgment of the circuit court unless it appear that the jurisdiction of the circuit court was invoked at the commencement of the suit on one of the grounds mentioned in the fifth section.

The decisions of this court are clear and uniform in support of this proposition.

Colorado Central Mining Company vs. Turck, 150 *U. S.*, 138, was ejectment in the circuit court for Colorado, verdict and judgment for plaintiff, which on error to the court of appeals was affirmed and writ of error allowed to this court.

On motion to dismiss or affirm, the writ was dismissed. Mr. Chief Justice Fuller, after referring to the view urged on behalf of the plaintiff in error, said :

"This view, however, ignores the settled doctrine that the inquiry, in cases such as this, into the jurisdiction of the circuit court is limited to the facts appearing on the record in the first instance. This has been often so held in the enforcement of the inflexible rule which requires this court in the exercise of its appellate power to deny the jurisdiction of courts of the United States in all cases where such jurisdiction does not affirmatively appear in the record on which it is called to act. * * * The jurisdiction had, however, already attached, and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented."

The Chief Justice in this opinion quotes from the earlier opinion of Mr. Justice Harlan in *Metcalf vs. Watertown*, 128 *U. S.*, 588, as follows:

"It has often been decided by this court that a suit may be said to arise under the Constitution or laws of the United States within the meaning of that act (18 Statutes, 470), even where the Federal question upon which it depends is raised for the first time in the suit, by the answer or plea of the defendant. But these were removal cases, in each of which the grounds of Federal jurisdiction were disclosed either in the pleadings or in the petition and affidavit for removal. In other words, the case at the time the jurisdiction of the circuit court of the United States attached by removal clearly presented a question of a Federal nature. * * * When, however, the original jurisdiction of a circuit court of the United States is invoked upon the single ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset from the declaration or the bill of the party suing that the suit is of that character. In other words, it must appear in that class of cases that the suit was one of which the circuit court at the time of its jurisdiction could properly take cognizance. If it does not so appear, then the court, upon demurrer or motion, or upon its own inspection of the pleading, must dismiss the suit, just as it would remand to the State court a suit which

the record at the time of removal failed to show was within the jurisdiction of the circuit court. It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend, and if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind."

In *Borgmeyer, administrator, vs. Idler*, 159 *U. S.*, 413, the plaintiff brought his action to recover the amount of certain commissions alleged to be due him on the judgment recovered against the Republic of Venezuela in September, 1832, in favor of Idler, in a litigation throughout which Chataing, plaintiff's intestate, was Idler's counsel and attorney. There was judgment for the plaintiff, which, on error to the circuit court of appeals, was reversed on the ground—

"That Idler's judgment had been annulled by the courts of that country and the allowance of the claim was ultimately secured by the award made by a mixed commission acting under an international treaty."

On motion to dismiss, the case was brought to this court on writ of error, and on motion to dismiss or affirm, the writ was dismissed.

Chief Justice Fuller, speaking for the court, said:

"In *Colorado Central Mining Company vs. Turck*, 150 *U. S.*, 138, we held that when the original jurisdiction of a circuit court of the United States is invoked upon the ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset, from the pleadings, that the suit is one of that character of which the circuit court could properly take cognizance at the time its jurisdiction is invoked, and that when the jurisdiction of a circuit court is invoked solely on the ground of diverse citizenship, the judgment of the circuit court of appeals is final, although another ground for jurisdiction in the circuit court may be developed in the course of the subsequent proceedings in the case. * * * The jurisdiction of the circuit court depended entirely upon diverse citizenship when

the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this court from the circuit court the writ of error could not have been entertained."

Ex parte Jones, 164 *U. S.*, 692, was a petition for an order to show cause why a writ of mandamus should not issue to the circuit court of appeals for the first circuit to allow an appeal to the Supreme Court from a decree of that court affirming a decree of the circuit court. This court denied the petition, and Mr. Justice Brown, in the course of the opinion, said:

"But even if another ground were developed in the course of the proceedings, the judgment of the court of appeals would be final if the jurisdiction of the circuit court were invoked solely upon the ground of citizenship."

Here the jurisdiction of the circuit court was originally invoked solely upon the ground of citizenship. Plaintiff's claim rested altogether upon the view that the constitution and statutes of West Virginia forfeiting the land of persons who for five successive years had failed to cause such land to be entered on the land books were in contravention of the Constitution of the United States; but he did not assert such claim in his declaration. He might have done so. No reason appears why two or more grounds of Federal jurisdiction may not be set up in the declaration. In *Colorado Central Mining Co. vs. Turck, supra*, Chief Justice Fuller said:

"If the plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented."

Certainly when two distinct grounds existed, as in this case—one of diverse citizenship, the other of the want of conformity of the constitution of West Virginia to the Constitution of the United States—and the latter ground was nec-

essary to an appeal to the Supreme Court from the judgment of the circuit court, both grounds should have appeared in the original pleading in the cause. The ground upon which the jurisdiction of a Federal court is claimed to rest should be set up by a traversable averment and not depend upon the accidents of a proceeding. Here the court gave an instruction to the jury in which it was stated that under the provisions of the constitution of the State of West Virginia the title to the land in question had been forfeited; and now appellate jurisdiction in the Supreme Court is claimed on the ground that the constitution of the State is in contravention of the Constitution of the United States. That certainly was not the ground upon which the jurisdiction of the circuit court was invoked by the plaintiff. He knew that the defendants held this land under mesne conveyances from the State, which had acquired the title under the forfeiture laws. His sole theory of attack was that these forfeiture laws did not provide the "due process of law" which the fourteenth amendment required. He did not apprise the defendants of this theory by appropriate averments in his declaration. Such averment was also necessary in order to a resort to the supreme court. The jurisdiction of the Federal courts, original and appellate, is prescribed by statutes, and they are mandatory upon the courts in determining questions of jurisdiction.

Plaintiff should have taken his case on writ of error to the circuit court of appeals, which had final appellate jurisdiction in cases which had been brought in the circuit court on the ground of diverse citizenship alone. The statute gives to the supreme court no jurisdiction in such cases. For other cases deciding that in order to give the circuit court jurisdiction of a case arising under the Constitution, laws, or treaties of the United States it must appear from the plaintiff's own statement of his claim that the case does so arise, see *Press Publishing Co. vs. Monroe*, 164 *U. S.*, 110; *Hanford vs. Davies*, 163 *U. S.*, 273; *Oregon, &c., R. R. Co. vs. Skottowe*, 162 U. S., 490.

ON THE MERITS.

The case has been so fully and admirably presented in the briefs of counsel already filed that no more would be reasonable or proper than a mere résumé of the arguments there unfolded.

The question presented here could not have arisen in many, if any, other of the original States, because the conditions out of which the question arises were wanting there. The vast territorial extent of Virginia's domain enabled, and indeed required, her to make the grants of her land in very large tracts, which in subsequent divisions of her territory extended over several counties and States.

Under the charters of 1606 and 1609, by which James the First granted the territory of Virginia, it was there defined as—

"All those lands &c. situate, lying and being in that part of America called Virginia, from the point of land, called Cape or Point Comfort, all along the sea coast, to the southward 200 miles, and from the said Cape or Point Comfort all along the sea coast, to the northward 200 miles and all that space or circuit of land lying from the sea coast of the precinct aforesaid, up into the land, throughout, from sea to sea, west and northwest, and also all the islands lying within 900 miles along the coast of both seas of the precincts aforesaid."

The western boundary of Virginia was the Pacific ocean. Augusta county, in Virginia, extended by description to the eastern bank of the Mississippi river, and the great State of Kentucky was merely a "district of Virginia." West of the Alleghany mountains population was sparse and the country mountainous and generally covered with timber. At the close of the Revolution grants were made by Virginia of vast tracts of this land, frequently 500,000 acres in a grant. The grant in this case is described in the declaration as lying in three States. As counties were laid off, the

jurisdictions in which a single grant lay became multiplied, and the difficulties in ascertaining boundaries and identifying portions of the grant became greatly increased. The burden of debt which the war of the Revolution cast upon Virginia made it imperative upon her to obtain by taxation a revenue sufficient to cover the annual expenses of her government, and also to satisfy the urgent demands of her creditors. The taxes laid upon waste and unoccupied lands were light in comparison, but the obstacles in the way of their collection appeared to be insuperable. Many of the larger land-holders were non-residents of the Commonwealth, with no personal property within her jurisdiction. The lands, from their size, location, and distribution in several counties, were difficult of ascertainment and assessment for taxation, and experience through many years proved that the owners of these lands were not bearing, but were selfishly evading, their share of the common burden.

It was to secure a proper return of their lands for taxation by the holders thereof that the policy of forfeiture to the Commonwealth in case of long-continued default was adopted.

By act of the General Assembly of Virginia passed February 5, 1810, it was enacted:

> Whereas it is represented to the General Assembly, that, many persons omit to enter their lands on the commissioners' books, and thereby elude the payment of any revenue tax thereupon; for remedy whereof,
>
> *Be it enacted*, That if any person having title to a tract or tracts of land in this Commonwealth shall fail to enter the same on the commissioners' book of that county in which the land lies, within eighteen months after the passage of this act, the same shall be forfeited to this Commonwealth. *Provided always*, That the rights of infants, *femes covert* and persons of insane memory shall not be affected by this law. (2 Revised Code, 533.)

And later, by act of the assembly passed February 27, 1835, it was enacted:

And whereas it is known to the General Assembly, that many large tracts of land lying west of the Alleghany mountains which were granted by the Commonwealth before the first day of April 1831, never were, or have not been for many years past, entered on the books of the commissioners of the revenue where they respectively lie; by reason whereof no forfeiture for the non-payment of taxes has accrued, or can accrue, under the existing laws, the Commonwealth is defrauded of her just demands, and the settlement and improvement of the country is delayed and embarrassed; for remedy whereof,

Be it therefore further enacted, That each and every owner or proprietor of any such tract or parcel of land shall on or before the first day of July 1836, enter, or cause to be entered on the books of the commissioners of the revenue for the county wherein any such tract or parcel of land may lie, all such lands owned or claimed by him, her or them through title derived mediately or immediately under grants from the Commonwealth, and have the same charged with all taxes and damages in arrear, or properly chargeable thereon, and shall also actually pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act concerning delinquent and forfeited lands, passed March tenth, 1832 had they been returned for their delinquency prior to the passage of that act; and upon their failure to do so, all such lands or parcels thereof not now in the actual possession of such owner or proprietor by himself, or his tenant in possession, shall become forfeited to the Commonwealth after the first day of July 1836, except only as hereinafter excepted.

And although in Virginia, by subsequent legislation, the penalty for failure to enter lands upon the commissioners' books has been changed from forfeiture of the land to fines upon the delinquent, yet in every subsequent code of that Commonwealth has the soundness of the policy and the validity of the legislation for the forfeiture of land been recognized and enforced.

By the Code of Virginia, 1849, title 12, chapter 35, section 31, referring to the effect of the preceding section, it is provided:

Neither shall it be construed to release any lands west of the Alleghany mountains which have been forfeited, or which may be liable to forfeiture for not having been entered on the land book, and charged with taxes prior to the said year 1832.

And this provision is repeated in the Code of Virginia, 1873, title 12, chapter 33, section 38.

In the admirable brief filed in this cause, entitled "Argument of James H. Ferguson, of counsel for James A. Nighbert and a large number of the other defendants named in the declaration in this case, in support of the decision of the court below," will be found collected and printed in full all the acts of the legislature of Virginia on this subject from October, 1629, down to June 20, 1863, when the constitution of the State of West Virginia was adopted, which provided in its eleventh article, section 8, as follows:

8. Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.

LAWS OF WEST VIRGINIA PROVIDING FOR FORFEITURE TO THE STATE OF ALL LANDS WHICH THE OWNERS THEREOF HAVE, FOR THE PERIOD PRESCRIBED, FAILED TO HAVE ENTERED ON THE ASSESSORS' BOOKS FOR TAXATION.

By act of March 4, 1869, being section 34 of chapter 31 of Code of West Virginia, 1868, it was provided:

34. It shall be the duty of any person owning any real estate to cause the same to be entered on the land books of the proper assessor, and charged with the State taxes thereon

not charged to the owner for the year 1832, or any year thereafter, heretofore, or hereafter, not released, paid, or in any manner discharged, which were and shall remain properly chargeable thereon. When any person owning real estate has not, and shall not have for five successive years, been charged on such books with such taxes on such real estate, the same, and all the right, title and interest of the owner, legal and equitable, thereto, shall, without any proceeding, be absolutely forfeited to and vested in this State, *Provided, however*, That such owner may, within one year after the passage of this act, cause such real estate to be charged with taxes, chargeable for any such years heretofore, and thereby prevent a forfeiture for the failure so to charge the taxes for such years.

In 1872 West Virginia adopted a new constitution, article 13, section 6, of which provides:

6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with State tax on said land, then, by operation hereof, the land shall be forfeited and the title thereto vest in the State. But if, for any one or more of such five years, the owner shall have been charged with State tax on any part of the land such part thereof shall not be forfeited for such cause. And any owner of land so forfeited or of any interest therein at the time of the forfeiture thereof, who shall then be an infant, married woman, or insane person, may, until the expiration of three years after the removal of such disability, have the land, or such interest charged on such books, with all State and other taxes that shall be, and that but for the forfeiture would be, chargeable on the land, or interest therein for the year 1863, and every year thereafter with interest at the rate of ten per cent. per annum; and pay all taxes and interest thereon for all such years, and thereby redeem the land, or interest therein: *Provided*, Such right to redeem, shall in no case extend beyond twenty years from the time such land was forfeited.

It appears from the record here that the land in controversy was part of a tract of 500,000 acres granted by the Commonwealth of Virginia to Robert Morris on June 23, 1795, then lying in the counties of Wythe and Russell, Virginia, and now lying in the counties of Mingo, Logan, Wyoming, and McDowell, in West Virginia; that by sundry mesne conveyances and legislative and judicial proceedings the title of Robert Morris to said tract of land became vested in the year 1866 in Robert E. Randall, trustee, and on June 29, 1886, in John R. Reed, trustee, and through sundry mesnes conveyances from said Reed, trustee, David W. Armstrong, and John V. Le Moyne, it passed on December 27, 1893, to the plaintiff, Henry C. King; that neither of the persons in whom the title to the land was vested had entered or caused to be entered the said land on the land books of the counties in which the land lay for the years 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, or 1894, nor had they or either of them paid any taxes thereon for any of said years, nor was the land entered on the books of any assessor for either of said years in the name of either of the persons; that defendants were in possession of and claiming title to parts of said land within the bounds of said tract and outside the reservation in said grant when this action was brought and at the time of the trial thereof; that the annual report of U. S. Buskirk, commissioner of school land of Logan county, West Virginia, filed in the circuit court of said county August 1, 1891, showed that—

"A tract of 500,000 acres, granted by the Commonwealth of Virginia to Robert Morris, assignee of William Cary-Nicholas, June 23, 1795, situate mostly in Triadelphia district, forfeited in the name of Robert Randall, trustee, and now claimed by John R. Reed, trustee, and other claimants unknown."

That at a circuit court continued and held for Logan county on Saturday, the 1st day of August, 1891, the report

of U. S. Buskirk, commissioner of school lands for Logan county, was made to the court, containing "a list of forfeited lands lying wholly and in part within this county, which, in his opinion, are liable to be sold for the benefit of the school fund in this State, which have not been so reported to said clerk by said auditor, all of which school lands the said commissioner of school lands suggests and recommends to the court should be sold under and by virtue of a suit in chancery to be brought and prosecuted in the name of the State of West Virginia under the provision of chapter 105 of the Code of West Virginia;" and the court, being of opinion that it was right and proper that such suit should be brought and prosecuted, did adjudge, order, and decree "that suit in chancery be commenced and prosecuted in the name of this State for the sale of the said lands mentioned in said report against the said persons above indicated, which suit shall be conducted and prosecuted in accordance with the provisions of said chapter."

Chapter 105 of the Code of West Virginia, as amended, provides, *inter alia*, for such a report from the commissioner of school lands to the circuit court of his county; and

SEC. 6. Every such report shall be recorded in the chancery order book of said court, and filed and preserved by the clerk of said court in his office, and thereupon a suit or suits in chancery shall be commenced and prosecuted by and in the name of the State of West Virginia for the sale of every such tract and parcel of land so reported, as required by section four of article thirteen of the constitution of this State; * * * and the former owner of any such tract of land at the time of the forfeiture thereof, or the person in whose name the same was forfeited, shall, if known, be made a defendant in such suit, and all persons claiming title to or an interest in any such lands shall, also, as far as known, be made defendants therein. And any person claiming an interest in any such land or in the proceeds thereof, not so made a defendant may file his petition in any such suit, stating what interest he claims therein, either in open court, or before a commissioner in chancery while the

suit is pending before him, or at rules, if the case be pending at rules, and shall thereupon become a defendant therein, and may defend and protect his interests, if he has any therein, to the same extent as if he had originally been made a defendant therein.

SEC. 7. All suits brought and prosecuted under the provisions of this chapter shall be commenced as provided in chapter 124 of the Code, and proceeded in, heard, and determined in the same manner, and in all respects as other suits in chancery are brought, prosecuted and proceeded in, and shall be subject to the same rules of chancery practice as other suits in chancery in the State courts of this State, except as herein otherwise provided, &c.

Section 16 provides for the recovery by the former owner of the land, his heirs or personal representatives, or any creditor having a lien on the land at the time of the forfeiture and still existing of the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon.

SEC. 17. The former owner, his heirs, devisees or assigns, of any real estate forfeited for any cause to the State of West Virginia, may at any time during the pendency of the suit for the sale thereof, and before a decree for the confirmation thereof has been made and entered by the court, file his petition therein in manner and form as provided in the next preceding section in relation to the excess of the proceeds of such sale, praying to be allowed to redeem so much only of such real estate as to which the title still remains in the State; and upon the filing of such petition, and upon such proof being made as would entitle the petitioner to the excess of the purchase-money of such real estate if the same had been sold, the court may by a proper decree, permit the petitioner upon the payment into court or to the commissioner of school lands, the costs, taxes and interest properly chargeable thereon, to be fixed by the court in its decree, to redeem the real estate mentioned in the petition. And upon such payment being made aforesaid the court shall enter its decree declaring the redemption of the real estate by the petitioner, so far only as the title thereto is in the State, as provided in this chapter, and so far as the petitioner has

shewn entitled to redeem the same; which decree shall operate as a release of such forfeiture of said real estate to the extent declared therein, and of all former taxes and interest charged and chargeable thereon. And such petitioner shall acquire no other title to the land redeemed than was vested in him immediately before such forfeiture, but such redemption shall in nowise affect or impair any right, title or interest any person may have in said real estate or any part thereof, by purchase from the State, or under and by virtue of section three of article thirteen of the constitution of this State."

So, it appears from the Code of West Virginia that ample provision is made by the statutes of that State for the ascertainment and registration of all the land in that State for assessment and taxation. Certain officers are charged with the duty of listing all the real estate within their respective counties which is subject to taxation, of returning such lists to the collectors of taxes, and also to the auditor of the State. These lists are arranged alphabetically in the names of the owners of the lands, so far as such owners are known; but, even despite all the precautions which have been contrived, it has always happened that many tracts of land lying in sparsely inhabited counties and in the mountain ranges escape discovery by the officers, and so escape taxation.

The State may not know of the existence of the tracts of land which its officers have failed to discover, but the owners of these tracts must be conclusively presumed to know of the land owned by them, and it is to their selfish interest that the State should remain in ignorance of these subjects of taxation and they be thereby relieved from bearing their contributive share of the common burden of State taxes. To meet this condition and to make it to the interest of the land-owner not to evade, but voluntarily to assume, his share of the taxes have the States of Virginia and West Virginia required that every land-owner within their respective borders shall examine the land books of the counties where

his lands may lie and ascertain from these public records whether or not his lands are therein listed for taxation, and if from any cause they have been omitted from the land books he shall give them in to the proper officer to be listed and taxed, and if such land-owner fail for five successive years to have his land placed upon the land books of the county where the land lies, then the title to the land so omitted passes absolutely to the State, and this without any judicial proceedings or proceeding in the nature of office found. The fact of omission for the period prescribed is one patent of record and admits of no denial. Of course, where fraud or mistake or any other ground for purely equitable relief exists that court is always open for the redress of such wrongs; but the forfeiture to the State results from the omission at the instant of the expiration of the period prescribed. It may be subsequently avoided upon sufficient grounds and in the proper forum, and adequate remedies are especially provided in the statutes above recited for the recovery from the proceeds of sale of the excess above the amount of taxes, interest, and costs, and also for the redemption of the land and for the full and complete protection of all his interests in the subject-matter of the suit.

So that it appears that the statutes of West Virginia subject the lands within that State to taxation under a uniform system, operating equally upon all persons, classes, and interests. They prescribe with precision the times, places, and offices at and by whom the assessment of lands must be made. They require the owners of lands which are not already entered upon the land books to cause the same to be entered therein. They denounce the penalty which will fall, *proprio vigore*, upon all land-owners who for five years disobey this requirement of the law. They prescribe how, upon the discovery of such disobedience and persistent recusancy, the lands so forfeited may be sold for the benefit of the public school fund, viz., by suit in chancery, brought and proceeded with as in other chancery cases. They pro-

vide for the appearance by petition in such chancery cause of the land-owner to assert his interests and have the same protected, with the right of appeal to the court of last resort in the State.

Nor is this policy of protecting the interests of the State and of her people by forfeiting to the State the land of those persons who in the face of the law persist for so long a time in refusing to bear their share of the common burden of taxation a novel or a strange doctrine. For more than a century it was observed and enforced in the mother State of Virginia, and her courts throughout that period have sustained both its constitutionality and its propriety. Her people and those of West Virginia have lived under no other system.

DUE PROCESS OF LAW.

On the trial of the cause the court below had instructed the jury that the title to the land claimed by the plaintiff had, prior to the deed under which plaintiff claimed, been forfeited to and vested in the State of West Virginia under the provisions of the constitution of the State. The plaintiff in error assigns as error (Record, p. 33) that "the said provision of said State constitution relating to forfeiture and attempting and purporting to forfeit and divest the title to land out of the owner and vest the same in the State for the failure of the owner of such land to cause the same to be entered upon the land books *are wanting in due process of law*, and are repugnant to and in conflict with article XIV, section 1, of the amendments to the Constitution of the United States."

"Due process of law" is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land (*Waite, C. J.*, in *Walker vs. Sauvinet*, 92 *U. S.*, 93).

It "refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at pleasure. * * * It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law" (*Hurtado vs. California*, 110 *U. S., C.*). "*The principles*, then, upon which the process is based are to determine whether it is 'due process' or not, and not any consideration of *mere form*" (*Cooley, Con. Lim.*, 356). "Legislation must necessarily vary with the different objects upon which it is designed to operate. It is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters—that is, by process or proceedings adapted to the nature of the case. "The great purpose of this requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." (*Dent vs. West Virginia*, 129 *U. S.*, 124.)

AS APPLIED TO TAXATION AND ITS INCIDENTS.

The clause recited from Magna Charta does not imply the necessity for *judicial* action in every case in which the property of the citizen may be taken for the public use. On the contrary, a *legislative* act for that purpose, when clearly within the limits of legislative authority, is of itself the law

of the land, and an act for levying taxes and providing the means of enforcement is, as we have seen, within the unquestioned and unquestionable power of the legislature. It is therefore the law of the land, not merely in so far as it lays down a general rule to be observed, but in all the proceedings and all the process which it points out or provides for in order to give the rule full operation. (*Cooley on Taxation, 1st ed., page* 38.)

"The existence of government, depending on the prompt and regular collection of revenue, must, as an object of primary importance, be insured in such a way as the wisdom of the legislature may prescribe. There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct, and if the officers entrusted with the execution of the laws transcend their powers to the injury of an individual, the common law entitles him to redress. But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial would materially impede, if not wholly obstruct, the collection of the revenue." (*Taylor, Ch. J.*, in *Cowles vs. Brittain*, 2 *Hawks*, 207, cited in Cooley on Taxation, p. 39.)

"As to this safeguard of 'the law of the land' in tax proceedings, neither the practice of governments nor the decisions of courts warrant us in saying that it includes a judicial finding of delinquency before a sale can be made. It means, beyond any question, regular and orderly proceedings under the general law by the proper department of government, and means nothing more." (*Cooley on Taxation, p.* 41, *note.*)

"The process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages or in subordination to the principles which underlie them." (*Bell's Gap R. R. vs. Pennsylvania*, 134 U. S., 239.)

"Undoubtedly where life and liberty are involved due process requires that there be a regular course of judicial

proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where the title or possession of property is involved, but where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether the notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable." (*Hagar vs. Reclamation District*, 111 *U. S.*, 701.)

In *Palmer vs. McMahon*, 106 *N. Y.*, the court of appeals of New York said:

"The proceedings by which taxes for governmental purposes are assessed, levied, and collected from the citizen are administrative and not judicial in their character and constitute due process of law within the meaning of the Constitution. Such proceedings have from necessity been exercised by governments during all times by summary methods of procedure, and to require the deliberation and delay incident to judicial proceedings in the exercise and enforcement of the tax power of the Government would seriously cripple its efficiency if not destroy its existence. Those methods were in existence and exercise long before the adoption of the constitution and have never been supposed to be affected thereby."

It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the time during which and the place where such complaints may be made (*Hagar vs. Reclamation District, supra*), and "it has been repeatedly decided by this court that the proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and that 'due process of law,' as applied to that subject, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient." (Kentucky Railroad Tax Case, 115 U. S., 331.)

"Taxes have not, as a general rule, in this country, since its independence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people, have established a different procedure, which, in regard to the matter, is and always has been due process of law." (*Kelly vs. Pittsburg*, 104 *U. S.*, 80.)

It is not essential, then, to the process or proceeding under which land is taken, its title divested from the former owner and vested in the State because of the failure of such owner to contribute his portion of the common burden of taxation, that there should be personal service of process, or indeed any other process than the notice which the general statute law of the State affords, through the public records and the public offices and agencies. It is enough that such process or proceedings are established by custom, usage, or positive law; that they are general and uniform in their operation and not confined to any particular class, section, or interest, nor dependent for their exercise upon the arbitrary will or the caprice of the officers or agents of the State.

Taxation is necessary in all societies to produce the means by which the very existence of the society may be maintained. All members of society are subject to such taxation, either as to their persons or their property, or both. The legislative branch of government alone is charged with the responsibility and the power of determining the subjects, the rates, and the proceedings for the assessment and the collection of taxes, and within constitutional limits the determination of the legislature is conclusive.* Where the subjects of taxation are known, visible, and within the reach of the officers of the law the taxes may be assessed directly upon them and they may be taken under distress or levy in satisfaction of the taxes assessed, but where such subjects are not known, or apparent, to the assessing officers resort is had to the person sought to be taxed to ascertain from him what property he has which is properly subject to taxation,

* Williams v. Supervisors of Albany, 122 U. S. 164

the existence and value of which lies within his own knowledge alone, such as income, choses in action, and any other property which has escaped the vigilance of the assessor. It may also happen, as, indeed, appears in this case, that property subject to taxation exists in the community, but neither its existence nor the name or residence of its owner is known to the assessing officer. In such case the community is without remedy, unless it can devise and employ some drastic measure which will make it more to the interest of such property-owner to declare himself and his property and submit to taxation than to continue his concealment and consequent evasion of the tax. The remedy which experience has shown to be most efficient is the provision by general statute that where one having property subject to taxation, the existence of which is unknown to the assessor, fails for a given length of time to have such property listed for taxation, it shall stand forfeited to the State, the neglect of the owner for such a length of time being conclusively taken as an abandonment of the property by him and a relinquishment of all title and claim thereto to the State.

As has been said, "There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will direct" (*Cooley on Taxation, p.* 39); and in *United States vs. Repentigny*, 5 *Wallace*, 267, where a large domain had been granted to Repentigny in 1750 by France on implied conditions of cultivation and residence, and it was contended that the United States had under the treaty of 1783 with Great Britain succeeded to all the rights that existed in the King of France, and that this domain had reverted to the King of France for breach of conditions. It was objected that no reunion to the royal domain could be asserted except by a judicial determination, but this court said:

"We think, upon the proofs in the record, this may well be doubted in the case of such prolonged neglect to conform

to the conditions of settlement, as in the instance before us it furnishes cogent if not irresistible evidence of the abandonment of the duties and obligations arising out of the conditions of the grant, and, consequently, of the grant itself, and invites a direct resumption by the sovereign, the lord paramount."

May it not reasonably be presumed, as against one who for a period of five years fails to give in his land to be listed for taxation, that he abandons it and relinquishes to the State his claim to title?

FORFEITURE OF LAND UNDER THE WEST VIRGINIA LAWS FOR FAILURE ON THE PART OF THE OWNER TO HAVE THE SAME ENTERED ON THE LAND BOOKS.

The constitution of West Virginia, article 13, section 6, provides:

It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or any part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for five successive years after the year 1869, the owner of any tract of land containing one thousand acres or more, shall not have been charged on such land books with State taxes on said land, then, *by the operation hereof*, the land shall be forfeited and the title vested in the State.

So the forfeitures took effect "by the operation hereof" of the constitution, and no legislation was needed to carry the constitution into effect; but by section 39 of chapter 31 of the Code of West Virginia it was provided:

It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or any part of it is situated, and to cause himself to be charged with the taxes thereon and pay the same. When for any five successive years after the year 1869 the owner of any tract of land containing one thousand acres or more, shall not have been charged on such books with the State taxes on said lands, then by the operation of law, and without

any proceeding therefor, the land shall be forfeited and the title thereto vested in the State.

Here, then, is the plain duty expressly laid upon every land-owner to have his land entered on the land books and thereby cause himself to be charged with the taxes therefor, and here, too, is the clear admonition that if he fail for five successive years to so subject his land for taxation it shall stand, *ipso facto*, forfeited to the State.

This is not a cause of action pursued against some persons and not against others or one the execution of which is left to the arbitrary will or caprice of certain officers or agents of the State, but it is a general law of uniform application in the State, and, from the necessity of the case, is self-executing. The fact must appear from the land book that the land is entered therein; if such fact does not appear, then, without more, that land stands forfeited to the State. What land? Any and all land of one thousand acres or more within the limits of the State which for five successive years has not been entered on the land book. When any tract of land of this description is discovered and the land book for five years past discloses no entry of such tract therein, it stands forfeited without inquest, finding, or judicial proceeding of any sort or kind. The due process of law begins with the enactment and publication of the statute. All land shall be entered for taxation, and all land remaining not entered for five successive years stands forfeited to the State. It continues as a standing admonition to all delinquents through the period of five years, and then the doom of forfeiture follows by operation of law. No further provision need be made by the legislature for the relief of the delinquent. He has had notice of time and place, and no more can he in justice demand. The statute and the constitution both admonish him as to the time, and the land books are part of the public records of each county and are by law deposited in the clerk's offices

of each county and in the office of the auditor of the State, and they, at all times open to his inspection, show him that his land is not and has not been entered in them; but the statutes of West Virginia, in tender consideration for the delinquent land-owner, go much further for his relief. His land stands forfeited by operation of the law, but he may apply in turn to the clerk of the county court, then to the county court in term, with the right of appeal from its judgment, and, if he has gone beyond the five years, he may report the facts to the commissioner of public school lands, who is required by law to file a bill in equity, under which all questions bearing upon the rights of the parties may be determined. The statutes are referred to and in the main recited in the briefs of other counsel for defendant in error here.

NO INQUEST OF OFFICE OR OTHER PROCEEDING NECESSARY TO ENFORCE A FORFEITURE UNDER THESE LAWS.

The legislature, to be sure, cannot take the land of A and give it to B. It cannot take the land of A for any public use without giving him just compensation therefor and taking it in the manner prescribed by law.

But if for any legal cause a man's land is forfeited to the State "a legislative act directing the possession and appropriation of the land is equivalent to office found" (*U. S. vs. Repentigny*, 5 *Wall.*, 268). "A forfeiture by the State of an interest in lands and franchises granted for the construction of a public work may be declared for non-compliance with the conditions annexed to their grant or to their possession when the forfeiture is provided by statute without judicial proceedings to ascertain and determine the failure of the grantee to perform the conditions. (*Farnsworth, &c., vs. Minn. & Pac. R. R. Co.*, 92 *U. S.*, 66; also *Bybee vs. O. & C. R. R. Co.*, 139 *U. S.*, 675, and *A. & P. R. R. Co. vs. Mingus*, 165 *U. S.*, 435.)

But this, as well as all the other questions presented here for consideration, has been settled for more than half a century in Virginia by the decisions of the court of appeals of that State.

In *Wild's Lessee vs. Serpell*, 10 *Grattan*, 408, Judge George Lee, who was distinguished above all his fellows for the accuracy and fullness of his learning in the law of real property, especially in its application to the tenures in Virginia, said after referring to certain decisions of that court:

"The same cases also sufficiently establish that in order to consummate and perfect a forfeiture in such a case no judgment or decree or other matter of record nor any inquest of office is necessary, but that the statutes themselves of their own force and by their own energy work out their own purpose and operate effectually to divest the title out of the defaulting owner and perfectly to vest it in the Commonwealth without the machinery of any proceeding of record or anything in the nature of an inquest of office. * * * Upon these subjects I have nothing to say upon this occasion except that, considering the peculiar condition of things in that part of the State lying west of the Allegheny mountains and the serious check to population and the improvement of the country and the development of its resources growing out of it, a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the legislature to enact them was clear and unquestionable."

Reliance appears to be placed by counsel for plaintiff in error in his brief (page 50) on the opinion of the elder Judge Tucker, in *Kinney vs. Beverley*, 2 *Hen. & Mumford*, 318, in which the construction of "An act to dispose of waste and unappropriated lands in the Commonwealth of Virginia on the *eastern* waters" was considered and applied, under which that learned judge expressed a doubt as to whether an inquest of office was not required; but that doubt does not appear to have been shared in by his two associates on the bench who delivered opinions, and there may have been room for doubt, under the language of that act, whether the

act was self-executing. So, too, in *Fairfax's Devisees vs. Hunter's Lessees*, 7 *Cranch*, 702, it appeared that the lands which had been granted by the governor of Virginia to Hunter had never been escheated and seized into the hands of the Commonwealth, as distinctly required by the act of assembly concerning escheators, and had never been the subject of any inquest of office. The court, after stating the principles of the common law as to the necessity of office found and possession, says:

"If there be no act of Virginia altering the common law, they would control;" but adds: "We will not say it was not competent for the legislature (supposing no treaty in the way) by a special act to have vested the land in the Commonwealth without an inquest of office for the cause of alienage."

It then proceeded to show that the confiscation acts of Virginia, so far from dispensing with the requirements of the common law, rather add to their strictness; for the act of May, 1779, ch. 45, expressly required an inquest of office before seizure, and forbade the issuing of a grant for twelve months after the return of the inquisition, and the difference between the Virginia act and the Maryland acts of 1780 is illustrated in the case of *Smith vs. State of Maryland*, 6 *Cranch*, 286.

The following decisions in Virginia and West Virginia, while not conclusive authority here, are yet convincing as to the reasons given for the conclusions reached. *Staats vs. Board*, 10 *Grattan*, 400; *Hale vs. Branscom*, 10 *Grattan*, 418; *Smith vs. Chapman*, 10 *Grattan*, 469; *Levasser vs. Washburn*, 11 *Grattan*, 580; *Usher vs. Pride*, 15 *Grattan*, 199; *McClure vs. Maitland*, 24 *West Virginia*, 573; *McClure vs. Maupertuis*, 29 *West Virginia*, 641; *Coal Co. vs. Howell*, 36 *West Virginia*, 501. And these cases have been followed by the Federal courts in *Reed vs. Dingess*, 60 *Federal Reporter*, 26; 8 *C. C. A.*

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